



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2005

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney-Civil Division
Bexar County District Attorney's Office
300 Dolorosa
San Antonio, Texas 78205

OR2005-00775

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 216779.

The Bexar County Commissioner's Court (the "commissioner's court") received a request for information concerning the election by Bexar County deputy sheriffs and detention officers to be represented by a particular organization in collective bargaining. You have submitted a number of Employee Petitions for Recognition as responsive to the request. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

receiving the request. You indicate that the commissioner's court received this request on October 19, 2004. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by November 2, 2004. Although you timely submitted your initial request for a decision to this office, we note that in your brief of January 19, 2005, which you submitted to this office in response to our request for additional information concerning "special circumstances" in accordance with Open Records Decision No. 169, you raise section 552.108 as an additional exception to disclosure. Section 552.108 is a discretionary exception that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive law enforcement exception), 522 at 4 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise section 552.108 and have therefore waived this exception.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has further found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Additionally, information also may be withheld under section 552.101 in conjunction with common law privacy upon a showing of certain "special circumstances." In Open Records Decision No. 169 (1977), we considered the personal safety concerns of public employees and recognized that there may be specific instances where special circumstances exist to except from public disclosure some of the employees' addresses. *See* Open Records Decision No. 123 (1976). In that decision, the employees demonstrated that their lives would be placed in danger if their addresses were released to the public. ORD 169 at 7. This office further noted that the initial determination of credible threats and safety concerns should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.* We noted, however, that "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* at 6.

Having reviewed the submitted information, we find that none of this information is intimate or embarrassing for purposes of common-law privacy under *Industrial Foundation*. See Open Records Decision Nos. 423 at 2 (1984) (scope of public employee privacy is narrow); see also Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving the credibility and effectiveness of the police force). You state however, that "many of the employees of the [Bexar County] Sheriff's Office operate in an 'undercover' capacity and knowing the names of Sheriff's Office employees could potentially threaten the undercover operations and possibly jeopardize the safety of the officers." Based on your representations, we find that, to the extent the names and employee identification numbers reflected in the submitted petitions are those of undercover officers, this information is confidential under section 552.101 in conjunction with the "special circumstances" component of common law privacy and they must be withheld from the requestor. See Open Records Decision No. 169 (1977). We find, however, that the information you have provided is insufficient to demonstrate the existence of special circumstances with regard to the names and employee identification numbers of the remaining deputy sheriffs and detention officers. You have not shown that release of the names and employee identification numbers of these remaining deputy sheriffs and detention officers would subject these individuals to an imminent risk of harm. We therefore conclude that the commissioner's court may not withhold the names and employee identification numbers of deputy sheriffs and detention officers who are not undercover officers on privacy grounds under section 552.101.

You also assert that section 552.111 of the Government Code is applicable to the submitted information. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After review of your arguments and the submitted information, we conclude you have not established that any of the information constitutes an internal communication consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the commissioner's court. Instead, the information at issue relates to administrative or personnel matters that do not rise to the level of policymaking issues. Therefore, none of the information may be withheld from disclosure under section 552.111.

In summary, to the extent the names and employee identification numbers reflected in the submitted petitions are those of undercover officers, this information is confidential under section 552.101 in conjunction with the "special circumstances" component of common law privacy and they must be withheld from the requestor. All remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 216779

Enc. Submitted documents

c: Mr. Rodolfo Macias
P.O. Box 240022
San Antonio, Texas 78224
(w/o enclosures)